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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. ERICK MORALES, Defendant and Appellant.	A141875 (San Mateo County Super. Ct. No. SC070612)

Defendant and appellant Erick Morales appeals following his conviction of first degree murder by means of lying in wait. We reject his claims of instructional error and affirm the judgment.

PROCEDURAL BACKGROUND

In March 2010, the San Mateo County District Attorney filed an information charging appellant with murder and alleging a lying-in-wait special circumstance. (Pen. Code, §§ 187, subd. (a), 190.2, subd. (a)(15).) In February 2014, a jury found appellant guilty of first degree murder and found true the special circumstance. In April 2014, the trial court sentenced appellant to life imprisonment without the possibility of parole. This appeal followed.

FACTUAL BACKGROUND

Appellant and Reynaldo Maldonado[1] were childhood friends from Guatemala who, in May 2001, were living with Morales's father and other relatives in Daly City. Appellant was 19 years old and a student at Westmoor High School in Daly City; the victim, Quetzalcoatl Alba, was also a student at Westmoor.

In May 2001, there was a storage locker at an apartment complex where a number of Westmoor High School students would hang out to talk, smoke marijuana, and watch television. They called it "The Spot." Before school on May 21, 2001, appellant, Alba, and two other students went to The Spot and smoked marijuana. They returned to school, but another student saw appellant and Alba leaving school at the start of the third period, around 10 a.m. Alba asked the student if he wanted to go with them, but the student declined. That afternoon, some Westmoor students went to The Spot and found Alba's dead body on the floor. An autopsy revealed that Alba died from stab wounds to the chest and neck.

The next day, a fellow student asked appellant if he knew Alba had been killed. Appellant replied that he did not know anything about it; he acted "normal" that day. Officers interviewed appellant on May 23, 2001. Appellant said he, Alba, and two others had cut class in the morning the day Alba was killed. They got food and went to a "secret place" in a grove of trees, where Alba and one of the others smoked marijuana. The group returned to school, but appellant left again. He hung out with Maldonado the rest of the morning and then returned to school. He denied leaving school with Alba at third period. When officers tried to contact appellant for a follow up interview, they were unable to locate him. The police had also interviewed Maldonado, and Maldonado had also disappeared.

The police obtained information that led them, on October 11, 2007, to search the backyard of the Daly City residence that appellant had shared with his father, Maldonado, and other relatives. The police found a canister buried in the yard containing Alba's cell

[1] Maldonado's conviction of first degree murder in a separate trial is also on appeal in this court, case number A141242.

phone, a knife, a latex glove, and a sweater or sweatshirt. On October 15, Maldonado was arrested in Miami, Florida. Officers located in his residence a photo of appellant squatting over Alba's body.

In 2009, appellant was arrested in New York state for driving under the influence. He gave the arresting officer a false name, but the police learned of his true identity by his fingerprints.

2009 Police Interview

In October 2009, appellant was interviewed in New York by Daly City police detectives. Appellant said he knew Maldonado from Guatemala. In Guatemala, Maldonado returned to their small town after living in Guatemala City and claimed to be connected to a secret police group. He tried to get appellant to join the group and threatened that the group would harm his family if he refused. Due to the threats, appellant left and came to California.

Maldonado came after appellant and found out where appellant was living in Daly City. Maldonado wanted a sexual relationship with appellant; appellant told the detectives he was not interested, but he eventually admitted having sex with Maldonado on multiple occasions.

Maldonado told appellant that members of the Guatemalan secret police group wanted to come meet appellant. Maldonado described them as police officers who did "bad things" and said appellant would have to do what they said. Maldonado said that if appellant killed someone the secret police group would trust him. If appellant refused, the group would harm him or his father. It did not matter who appellant killed.

Appellant refused, but Maldonado was insistent. Maldonado said he would commit the murder and tell the secret police group appellant committed the murder, if appellant agreed to be in a relationship with Maldonado. Maldonado told appellant to bring someone to The Spot for Maldonado to kill. Maldonado instructed appellant that, when they were all at The Spot, appellant should leave to get something to eat and Maldonado would commit the murder while appellant was away. Maldonado said they could make the secret police group believe appellant had committed the murder by

photographing appellant with the victim and knife. Afterwards, appellant's father would not be harmed. Appellant agreed to Maldonado's plan.

On the day of the murder, Alba said he was going to The Spot and appellant went with him. Maldonado was there. Maldonado said he was hungry and suggested that appellant go get food. Maldonado said he would stay because he was "too high." Appellant knew that was a lie because Maldonado did not smoke marijuana. Although appellant was reluctant because he did not want Alba to get hurt, appellant left the storage locker. Appellant did not get food, because he knew it was just a "trick" to create an excuse for him to leave. He saw a police car pass slowly and came close to telling the officer what was happening. When appellant returned, Alba was dead. Maldonado took a photo and told appellant to return to school. Appellant did so.

Appellant denied killing Alba and claimed Maldonado had set him up.

Appellant's Evidence

Appellant did not testify. He presented testimony from several witnesses regarding his relationship with Maldonado in Guatemala and in the United States. The testimony suggested Maldonado was obsessed with appellant, controlling, and threatening.

DISCUSSION

I. *The Failure to Fully Instruct on Second Degree Murder Was Harmless*

Appellant contends the trial court denied his right to due process because it failed to fully instruct the jury on the lesser included offense of second degree murder. His claim fails.

A. *Background*

The information charged that appellant "willfully, unlawfully and with malice aforethought" murdered Alba and alleged he did so "by means of lying in wait." At trial the prosecutor argued the jury should convict appellant of first degree murder. "First degree murder, like second degree murder, is the unlawful killing of a human being with malice aforethought, but has the additional elements of willfulness, premeditation, and deliberation which trigger a heightened penalty." (*People v. Chiu* (2014) 59 Cal.4th 155,

166.) " '[P]roof of lying-in-wait . . . acts as the functional equivalent of proof of premeditation, deliberation and intent to kill.' " (*People v. Boyette* (2002) 29 Cal.4th 381, 435.) An aider and abettor may be convicted of first degree murder if the prosecution shows "that the defendant aided or encouraged the commission of the murder with knowledge of the unlawful purpose of the perpetrator and with the intent or purpose of committing, encouraging, or facilitating its commission." (*Chiu*, at p. 167.) In his closing, the prosecutor argued appellant murdered Alba with Maldonado and the murder was of the first degree based on the evidence of premeditation and commission of the murder by means of lying in wait. The prosecutor also argued that, if the jury believed appellant's story that Maldonado killed Alba by himself, appellant was guilty as an aider and abettor. He emphasized appellant's admission to the police that he accompanied Alba to The Spot with knowledge of Maldonado's murderous plan, and left on Maldonado's cue under the pretext of getting food with the knowledge Maldonado intended to use the opportunity to kill Alba. The jury was provided verdict forms for first degree murder and second degree murder, as well as for the lying in wait special circumstance.

The trial court instructed the jury regarding murder with a modified version of CALCRIM No. 520, as follows: "The defendant is charged in Count I with murder in violation of Penal Code section 187. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant committed an act that caused the death of another person; [¶] AND [¶] 2. When the defendant acted, he had a state of mind called malice aforethought. [¶] The defendant acted with malice if he unlawfully intended to kill. [¶] Malice aforethought does not require hatred or ill will toward the victim. It is a mental state that must be formed before the act that causes death is committed. It does not require deliberation or the passage of any particular period of time. [¶] If you decide that the defendant committed murder, it is murder of the second degree, unless the People have proved beyond a reasonable doubt that it is murder of the first degree as defined in CALCRIM No. 521."

The trial court *omitted* a portion of CALCRIM No. 520 defining express and implied malice. The omitted portion reads: "There are two kinds of malice aforethought, express malice and implied malice. Proof of either is sufficient to establish the state of mind required for murder. [¶] The defendant acted with *express malice* if he unlawfully intended to kill. [¶] The defendant acted with *implied malice* if: [¶] 1. He intentionally committed an act; [¶] 2. The natural and probable consequences of the act were dangerous to human life; [¶] 3. At the time he acted, he knew his act was dangerous to human life; [¶] AND [¶] 4. He deliberately acted with conscious disregard for human life." (CALCRIM No. 520.)

The trial court instructed the jury regarding first degree murder using a modified version of CALCRIM No. 521. The instruction identified and defined the two alleged theories of first degree murder and concluded, "The People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime. If the People have not met this burden, you must find the defendant not guilty of first degree murder and the murder is second degree murder." The court *omitted* immediately preceding language that, "The requirements for second degree murder based on express or implied malice are explained in CALCRIM No. 520, First or Second Degree Murder With Malice Aforethought." (CALCRIM 521.)

B. *Analysis*

The essence of appellant's argument is that, "because the definition of malice required for second degree murder contained in the pattern instruction was omitted from the instruction given to appellant's jury, it was not an adequate instruction because it failed to instruct on the elements of second degree murder, even as the jury was told it would be the default verdict if they found murder had occurred."

" 'The trial court is obligated to instruct the jury on all general principles of law relevant to the issues raised by the evidence, whether or not the defendant makes a formal request.' [Citations.] 'That obligation encompasses instructions on lesser included offenses if there is evidence that, if accepted by the trier of fact, would absolve the defendant of guilt of the greater offense but not of the lesser.' [Citations.] . . . [T]he trial

court ha[s] a duty to instruct on 'all theories of a lesser included offense which find substantial support in the evidence.' " (*People v. Rogers* (2006) 39 Cal.4th 826, 866–867 (*Rogers*).)

Appellant argues that, because the trial court failed to instruct the jury on all the elements of second degree murder, "[i]n a situation where the jury found [appellant] not guilty of first degree murder, the instruction given could be read as a directed verdict for second degree murder." Assuming the trial court erred in failing to give a complete instruction on express and implied malice, any error was harmless.[2]

At the outset, we reject appellant's assertion the instructions in the present case "left the jury with essentially an all-or-nothing choice." That phrase applies to a situation where the failure to instruct on a lesser included offense leaves the jury with a stark choice between a conviction on the greater offense or an acquittal. (See, e.g., *People v. Geiger* (1984) 35 Cal.3d 510, 519–520, overruled on another ground in *People v. Birks* (1998) 19 Cal.4th 108, 116; *People v. Walker* (2015) 237 Cal.App.4th 111, 115 (*Walker*); *People v. Campbell* (2015) 233 Cal.App.4th 148, 172.) That was not the situation in the present case. Instead, the jury was left with a choice between a conviction of first degree murder or conviction of the identified, but incompletely defined, offense of second degree murder. If the jurors had any doubt about the propriety of a first degree murder verdict, they knew they could convict appellant of second degree murder instead. The prejudicial dynamic that exists in the "all or nothing" situation was not present here. (See *Geiger*, at p. 519 [referring to a situation where "the jury entertains a reasonable doubt of

[2] We reject respondent's contention that appellant forfeited his claim because he did not request that the court "amplify" its "correct" instruction that "if the prosecution did not prove that the murder was first degree . . . , it was second degree murder." The case respondent cites, *People v. Lee* (2011) 51 Cal.4th 620, 638, did not involve a failure to instruct on the elements of an offense. Although the trial court did not have a sua sponte duty to amplify or clarify otherwise proper instructions, the court *did* have a sua sponte duty to provide complete instructions on " 'all theories of a lesser included offense which find substantial support in the evidence.' " (*Rogers*, *supra*, 39 Cal.4th at pp. 866–867.) We assume for purposes of the present decision that there was sufficient evidence to require the court to instruct on the implied and express malice theories of second degree murder.

guilt of the charged offense but returns a verdict of guilty of that offense solely because the jury is unwilling to acquit"].)

We also reject appellant's contention the trial court's incomplete instruction was federal constitutional error subject to the beyond a reasonable doubt harmless error review standard of *Chapman v. California* (1967) 386 U.S. 18. The California Supreme Court has directed that "The erroneous failure to instruct on a lesser included offense generally is subject to harmless error review under the standard of *People v. Watson* (1956) 46 Cal.2d 818, at pages 836–837. Reversal is required only if it is reasonably probable the jury would have returned a different verdict absent the error or errors complained of. " (*Rogers*, *supra*, 39 Cal.4th at pp. 867–868.) Appellant makes no effort to distinguish *Rogers* and other California Supreme Court cases on this point.[3]

In the present case, it is not reasonably probable a juror would have rejected the prosecution's theories that appellant acted by lying in wait and with premeditation had the jury been provided a complete instruction on second degree murder. (*Rogers*, *supra*, 39 Cal.4th at pp. 867–868.) The only arguable theory of prejudice we can discern is that the trial court's instructions failed to inform the jury how to determine whether appellant acted with malice aforethought if the jury doubted appellant intended to kill Alba. In that event, it would have been appropriate for the jury to consider whether appellant harbored implied malice, which requires knowledge that one's conduct endangers the life of another and a conscious disregard for life. (*People v. Chun* (2009) 45 Cal.4th 1172, 1181.) However, appellant does not explain why, if any jurors had doubt that appellant intended to kill Alba, they would have convicted appellant of the *greater* offense of first

[3] Although we are in any event bound to follow the California Supreme Court on the issue, the federal cases appellant cites for the proposition that the due process clause requires instructions on lesser included offenses are inapposite. In those cases the concern was with instructional error that effectively forces a jury to choose between a conviction or an acquittal. (See *Schad v. Arizona* (1991) 501 U.S. 624, 647–648; *Vujosevic v. Rafferty* (3d Cir.1988) 844 F.2d 1023, 1027–1028; *Ferrazza v. Mintzes* (6th Cir. 1984) 735 F.2d 967; but see *Solis v. Garcia* (9th Cir. 2000) 219 F.3d 922, 928–929 [noting split among circuits regarding whether due process requires lesser included offense instructions in non-capital cases].)

degree murder. If any jurors had such doubt, but did not want to acquit him altogether, they would have supported at most only a conviction of second degree murder. The prosecutor made that option plain in his closing, stating "if you don't find that either of those theories [of first degree murder] are supported, then you can find the defendant guilty of second degree murder." The jury was, of course, instructed that the People were required to prove beyond a reasonable doubt the killing was first degree murder and "[i]f the People have not met this burden, you must find the defendant not guilty of first degree murder and the murder is second degree murder." (See *Rogers*, at p. 868 [relying on similar instruction in prejudice analysis].) That the jury *did* find that appellant acted with premeditation and/or committed (or aided and abetted) the murder by means of lying in wait demonstrates conclusively that no juror doubted appellant intended to kill Alba.

It is also not reasonably probable the result would have been more favorable to appellant had the trial court given a complete instruction on second degree murder because the evidence of appellant's intent to kill was overwhelming. "In determining whether a failure to instruct on a lesser included offense was prejudicial, an appellate court may consider 'whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result.' " (*Rogers*, *supra*, 39 Cal.4th at p. 870.) The prosecution argued that appellant was a direct co-participant in the murder. Although that factual theory was not overwhelmingly supported by the evidence, the only plausible alternate version of events was that provided by appellant in his 2009 police interview. In that interview, appellant effectively *admitted* he aided and abetted a premeditated killing by means of lying in wait. On appeal, appellant argues his "uncertainty that Maldonado actually intended to kill anyone, but his willingness to take a risk that he might do so if he brought Alba to him, supported conviction of second degree murder" under an implied malice theory. But appellant cites no *evidence* of any such uncertainty. Under appellant's version of events as related to the police, any uncertainty he may have had about Maldonado's intent upon arrival at The Spot was dispelled when Maldonado gave the pre-arranged cue

for appellant to leave. Appellant made it clear in his police interview that he believed Maldonado was killing Alba while appellant was away. Neither does appellant cite any authority that the evidence appellant was controlled by Maldonado or acted under duress due to Maldonado's threats relieved him of legal responsibility for the killing or provided a legal basis to convict him of only second degree murder. "[D]uress is no defense to killing an innocent person." (*People v. Anderson* (2002) 28 Cal.4th 767, 772.) Thus, even assuming appellant participated in Maldonado's murderous scheme only because of Maldonado's threats, he could still be found guilty of first degree murder as a direct aider and abettor.

The trial court's incomplete instruction on second degree murder was not prejudicial.

II. *The Failure to Instruct With CALCRIM No. 641 Was Harmless*

The jury was provided verdict forms for first and second degree murder, but the court failed to instruct the jury with CALCRIM No. 641. That instruction would have informed the jury, among other things, that it could consider those "different kinds of homicide in whatever order" it wished and would have directed the jury not to "return a verdict form stating that the defendant is guilty of second degree murder unless you all agree that the defendant is not guilty of first degree murder." (CALCRIM No. 641.) The bench notes to the instruction state, "In all homicide cases in which the defendant is charged with first degree murder and one or more lesser offense is submitted to the jury, the court has a **sua sponte** duty to give" the instruction or a similar instruction. (Judicial Council of Cal., Crim. Jury Instns. (2013) Bench Notes to CALCRIM No. 641, p. 403.) Appellant contends the trial court's failure to give the instruction was prejudicial error.

We assume for purposes of this decision the trial court erred in failing to give CALCRIM No. 641. (See *People v. Kurtzman* (1988) 46 Cal.3d 322, 330–331, 335 (*Kurtzman*) [trial court may not instruct jury not to consider lesser offense before reaching not guilty verdict on greater offense].) But appellant has not shown the failure to instruct was prejudicial. Appellant argues his jury "had no idea that it could consider whether the evidence fit better with a finding of first degree murder or second degree

murder before reaching its verdict" and that the instructions effectively designated second degree murder as "the default option" suggested the jury should consider first degree murder first.

In light of the harmless error analysis with regard to the failure to fully instruct on second degree murder, it is not reasonably probable the result would have been more favorable had the trial court given CALCRIM No. 641. (*Kurtzman, supra*, 46 Cal.3d at p. 335.) As explained previously, the evidence overwhelmingly demonstrated appellant at least aided and abetted a premeditated murder committed by means of lying in wait. Moreover, appellant points to nothing in the instructions that *prohibited* the jury from considering the offenses in whatever order they preferred. (See *id.* at p. 330 ["Jurors given no explicit guidance in the matter could, of course, commence deliberations in any order they wished, whether considering the lesser offenses first or beginning with the greater."].) In *Kurtzman*, the trial court instructed the jury "not to 'deliberate on' or 'consider' voluntary manslaughter unless and until it had unanimously agreed on second degree murder." (*Id.* at p. 335.) Considering the lack of a similar directive in the present case as well as the overwhelming evidence supporting the verdict, failure to instruct with CALCRIM No. 641 was harmless.

DISPOSITION

The judgment is affirmed.

SIMONS, J.

We concur.

JONES, P.J.

NEEDHAM, J.

(A141875)